

**“I am confident that justice will prevail in the end and I will be vindicated – what saddens me is the professional jealousy and the unprofessional desire for control.”**

*On April 28<sup>th</sup> 2019, an international arbitrator and construction expert Professor Sundra Rajoo, wrote a responsive letter to the Russian Arbitration Association explaining his version of the events that led to his resignation from the Director’s position of the Asian International Arbitration Centre (AIAC) in Kuala-Lumpur.*

*By Dmitry Artyukhov, Arbitration.ru Editor-in-chief*

## **Background**



**Professor Sundra Rajoo attending the Annual RAA Conference 2015 in Moscow**

Professor Sundra Rajoo is a Malaysian arbitrator, who has chaired the Asian International Arbitration Centre (AIAC) in Kuala-Lumpur from 2010 to 2018. He was President of the Chartered Institute of Arbitrators (2016) as well as the Past Chairman of the Chartered Institute of Arbitrators Malaysia Branch and past

Deputy-President of the Malaysian Institute of Arbitrators. He is author of

numerous books on international arbitration as well as construction law in Malaysia. Sundra Rajoo is listed on many Panels of Arbitrators worldwide. In November 2018, he was detained by the Malaysian anti-corruption commission (MACC), which has also searched his office. Then Sundra faced criminal charges for the breach of trust against the AIAC.

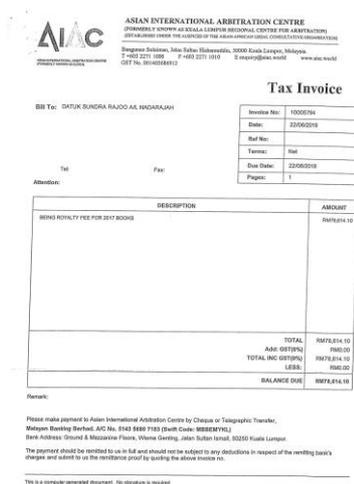
## **Charges**



**Professor Sundra Rajoo attending the Annual RAA Conference 2015 in Moscow**

Prof. Sundra Rajoo was accused by the Malaysian government for an alleged misuse of USD 220,000 and is now facing criminal charges for the breach of trust against the arbitration centre, which he

was chairing for 8 years, AIAC<sup>1</sup>. According to the Attorney General of Malaysia, the former director of AIAC is accused of spending funds on a purchase of a book he authored, the 2<sup>nd</sup> edition of the Law and Practice of Arbitration, published in 2016 by LexisNexis. The offence carries a sentence from 2 to 20 years in prison, a fine and whipping as corporal punishment is still practised in Malaysia.<sup>2</sup>



**Excerpt from Letter of Undertaking to pay out royalties from Prof. Sundra Rajoo to the AIAC**

No further details of the criminal charges are known to the editor. Prof. Sundra Rajoo commented that *“I was simply left with no choice - with that kind of duress, where I was detained and forced to resign without ever have been asked a question by any authority before so I could explain.”* He has repeatedly denied criminal charges at the court proceedings and in a letter sent to his fellow arbitration colleagues from the Russian Arbitration Association. *“I made every effort to ensure that any royalties paid to me were reimbursed to the AIAC,”* – he once wrote. In 2018 the arbitrator has paid the AIAC royalty of ca. USD 19,000.

He describes the book as *“a resource to explain Malaysian law especially in the context of international dispute resolution.”* Remarkably, the book that brought misery to Prof. Sundra Rajoo has received very positive reviews globally. *“It does not happen often that a treatise focused on a particular region is valuable to a global readership at large. <...> Rajoo’s contribution belongs on the shelves of arbitration practitioners and scholars right next to Fouchard, Gaillard and Goldman, Redfern and Hunter and Gary B. Born. It is past time that these standard works, which have all been written from a Western perspective, are complemented by an Asian voice on arbitration,”* – wrote Mr J. Ole Jensen in Transnational Dispute Management book review.

**Remedy sought**

<sup>1</sup> The AIAC is the successor of Kuala Lumpur Regional Centre for Arbitration (KLRC), renamed in February 2018.  
<sup>2</sup> The World Justice Project Rule of Law Index 2017-2018 published in the U.S. ranked Malaysia 53rd out of 113 countries, preceded by Brazil and followed by Tunisia (with Russia ranked 89th). The Index measures countries’ adherence to the rule of law from the perspective of ordinary people and their experiences and presents a portrait of the rule of law in 113 countries by providing scores and rankings based on eight factors: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice, says the publication.

Prof. Sundra Rajoo sought remedy against the Malayan Attorney General’s charges in court by appealing to his diplomatic immunity as President of an international organization. The AIAC that he was chairing is regulated by an international agreement called the 2013 Host Country Agreement between the Asian African Legal Consultative Organization (AALCO) and the Government of Malaysia.

Besides Kuala-Lumpur, AALCO has arbitration centres in Teheran, Cairo, Nairobi and Lagos. The head of the AIAC, as well as other branches of the organization, reports to and is supervised by the Secretary General of AALCO. Therefore, Prof. Rajoo appealed to his personal immunity granted to him by the International Organizations Act 1992 and the KLRCA Regulations from 1996 and the AALCO-Malaysian Host Country Agreement as the “High Officer”, being the Director of the AIAC.

- \*Kindly inform the Hon AG that I would strongly protest and disassociate myself and AALCO from these charges as they, on the face of them, contravene the Host Country Agreement as stipulated in my letter of 22 March 2019 to the Hon Minister of Foreign Affairs of Malaysia on this matter (also copied to the AG).
6. This letter therefore serves also as the said formal response to the notification.
  7. While appreciating and respecting your unfettered discretion to make prosecutorial decisions in Malaysia for crimes committed in Malaysia in violation of Malaysian law, I am wondering if you may clarify the true intent of the notification, and more so, in the light of the initial request of the Government of Malaysia to AALCO as stipulated in the Letter. From the notification indicate that the Government of Malaysia no longer needs the agreement with AALCO for Dink Sunda Rajoo v/o Nalanda's immunity as the former High Officer of AIAC to face criminal jurisdiction of Malaysia for some of his official actions?
  8. The request by the Government of Malaysia seeking an agreement with AALCO, together with your email to me of 21 Feb 2019 and other correspondence on this matter, conspicuously indicate, and rightly so in view of AALCO, that without an ad hoc waiver of Dink Sunda Rajoo v/o Nalanda's immunity as the former High Officer of AIAC under Article III (b) of the Host Country Agreement from criminal jurisdiction of Malaysia, it will not be possible to enforce your domestic criminal jurisdiction.
  9. It was because of this request that I have officially written to the Minister of Foreign Affairs, in the Letter, giving AALCO's reasoned objection of the Malaysian government's request for the ad hoc waiver.
  10. I believe that the question of immunity of a former High Officer of AIAC under Article III (b) of the Host Country Agreement from criminal jurisdiction of Malaysia as determined by the Minister pursuant to Act 454 (Malaysia) does not become irrelevant because the request for the waiver of the same is refused. Nor does it become a matter for a local court to decide just because AALCO has refused the request of the Government of Malaysia for an agreement to waive the said immunity. I equally, do not believe that the disagreement between AALCO and the Government of Malaysia on the waiver would become a matter for an unilateral prosecutorial discretion of the Attorney General or even a question of law, directly or indirectly, to be decided by a local court.
  11. The Host Country Agreement has sufficient provisions on settling any differences or disputes between AALCO and the Government of Malaysia on the interpretation or application of its Articles. Neither the Penal Code (Malaysia) nor the Act 454 can reasonably be used to defeat the clear Articles of the Host Country Agreement.
  12. The timing of your notification is also crucial much as it is not clear to me whether the charges were instituted at the Sessions Court in Kuala Lumpur before or after the Letter came to your attention. In case the Letter came to your attention after the charges, will the above questions be relevant. I also understand you signed the formal approval for these charges under Act 454.

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**Excerpt from Prof. Dr. Kennedy Gastorn's, Secretary General of AALCO letter to Attorney General of Malaysia, Minister of Foreign Affairs of Malaysia and the MACC**

The state has claimed that the immunity covered only his actions as the officer of the AIAC, but not his personal actions. The Attorney General proceeded with the charges against Prof. Rajoo in March 2019. Rajoo called for a judicial review of the prosecution’s actions, filing a claim against the Ministry of Foreign Affairs, the Attorney General of Malaysia and the MACC.

The Secretary General of AALCO sent a letter of diplomatic protest to the Malaysian Ministry of Foreign Affairs – an unprecedented step in the 64-year history of this organization which was founded in 1955.

In his letter, Prof. Rajoo gives vivid details of his attempted arrest Before the judicial review hearing: *“Whilst I was away attending to a religious ceremony out of town, agents of the MACC surrounded my home in Kuala Lumpur beginning from the late hours of the Friday night of the weekend before the hearing. They left letters in my home, which I have now seen, requiring me to attend at the MACC on Sunday and that I would be charged on Monday. I would no doubt have been arrested, held overnight, and brought to Court in handcuffs if I had not been fortuitously away.”*

[35] As pointed out by the Federal Court in *Metramac Corp Sdn Bhd v Fauziah Holding Sdn Bhd* [2006] 4MLJ 113, on the test whether an issue or matter has become academic in the following words :

*"The test therefore, in deciding whether an appeal has become academic is to determine whether there is in existence a matter in actual controversy between the parties which will affect them in some way. If the answer to the question is in the affirmative the appeal cannot be said to have become academic."*

[36] In a recent Federal Court's decision, *Bar Council Malaysia v Tun Dato' Seri Ariffin bin Zakaria & 3 Ors & another appeal* (No. 06(F)-1-01-2018(V)) it states the general principle is that the court does not answer academic questions.

[37] The case of *Sun Life Assurance Co. of Canada v Jervis* was quoted in this case where the relevant part of Lord Chancellor Viscount Simon views was made reference to by the court which *inter alia* are the following :

*"I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the Respondent in any way. If the House undertakes to do so, it would not be deciding an existing issue between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellant hopes to get decided in its favour without any way affecting the position between the parties."*

[38] In another case quoted by the Federal Court, Lord Bridged in *Ainsbury v Millington* [1987] 1 All ER 929, *inter alia* said this :

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### Excerpt from the Kuala Lumpur High Court judgement

In its ruling on the matter, the Malaysian court ruled that it lacks jurisdiction to rule on Attorney General's actions and stated that the Attorney General has the "unfettered competence" to initiate and stop the criminal proceedings. The Malaysian court refused to assess whether Rajoo acted on said charges as the Director of the AIAC or as a private individual. However, absent such assessment the court was unable to rule on the issue of the diplomatic immunity. The court considered this question as a rather "academic" and therefore having no effect on the parties. In Prof. Rajoo's view this issue was at the heart of the problem because it could answer whether a director of an international organisation can be charged in the case: *"The immunity issue is a live one as on 6<sup>th</sup> March 2019, I had filed for judicial review in Civil High Court for declaratory relief and consequential relief of prohibition and certiorari. On 22<sup>nd</sup> March 2019, AALCO confirmed its refusal to waive my immunity. On 26<sup>th</sup> March 2019, I was charged in the criminal Sessions Court. On 3<sup>rd</sup> April 2019, AALCO has lodged a strong protest and disassociated itself from both the AG's action and also, the Acting Director's purported waiver of immunity. I understand AALCO is consulting its member states on further action to be taken on the matter."*

### Possible causes

Prof. Rajoo explains: *"It was my plan to display Malaysia as a mature arbitral jurisdiction and the head of the KLRCA as a person with the necessary expertise to take things forward – which had the blessings of the AALCO and the Chairman of the KLRCA Advisory Board."*

In his letter sent to the members of the international arbitration community, Prof. Rajoo explained that the accusations against him are part of the current Malaysian political changes: *"There has been a regime change in Malaysia from May 2018. The new Government has removed and sacked many heads of business, statutory bodies and Government departments and replaced them including the former Attorney General. In my case, it was done more extremely by of an arrest and trumped up charges so that I resign given the fact that AIAC is an international Organisation based in Malaysia under the auspices of AALCO."* *"If the relationship between AALCO*

*and AIAC survives with the current incumbents in AIAC, the AALCO will then have to perform the additional functions of a watchdog over the centre given the circumstances, and justifiably so”,* continues Prof. Rajoo.

In his letter Prof. Rajoo also mentions twice *“the expunged dissenting judgment of his Lordship, Datuk Hamid Sultan in the Court of Appeal.”* In July 2018, Court of Appeal judge Hamid Sultan Abu Backer in the ruling on a construction case of Leap Modulation Sdn Bhd vs PCP Construction Sdn Bhd called the AIAC *“a foreign governmental organization intentionally or ignorantly given the monopoly to administer matters related to arbitration.”* The named judge stated that *“the stakeholder of justice must take serious steps under the new Government to investigate the role of KLRCA (AALCO) viz-a-viz access to justice.”* The Malaysian Federal Court expunged this dissenting judgment alongside with the affixed to it order for the MACC and police to investigate the arbitration centre, posted Weehingthong.org Malaysian news blog.

Professor Rajoo speaks with bitterness about his forced resignation: *“I still recall taking the job in 2008 when no one wanted to take it up – we were half a floor, three staff in total having a caseload that could be counted on fingers. At that time, forgoing substantial time from my well-to-do arbitrator practice, I jumped on board to lead the Centre to what it has become today, a two-building campus having been described by GAR as the world’s best hearing facility outside of the Permanent Court of Arbitration in The Hague, an annual case load of over a 1000 cases, more than 45 staff including 15 legal counsels. <...> I was also deeply saddened that AIAC is not following up on the license to provide ADR services in Russia which I had earlier pursued with some vigour.”*

Professor Rajoo was released by the court on bail of USD 25,000 immediately on being charged. He is now focusing on his arbitral practice and writing works. He is able to travel abroad and was chairing a recent ICC arbitration in New Delhi.

In 2017, contributors to the 35 ASA Bulletin Harald Sippel and James Ding wrote: *“Any arbitration is in safe hands with the current Director, Datuk Professor Sundra Rajoo, who is a very prominent arbitration practitioner both internationally and in Malaysia. That being said, a question persists, asking what will happen to the position once the current Director retires. Whoever takes over from Datuk Professor Sundra Rajoo will have big shoes to fill...”*

## Sources

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